No. 15,410

IN THE

United States Court of Appeals

For the Ninth Circuit

PHILLIP DANIELS,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

BRIEF FOR THE APPELLEE.

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JURISDICTIONAL STATEMENT.

Appellant was convicted upon his plea of guilty in the District Court for the District of Alaska, Third Judicial Division at Anchorage, Alaska, the Honorable Anthony J. Dimond presiding, of a violation of Section 65-4-1, ACLA, 1949.

Upon such plea of guilty and conviction the appellant was sentenced to imprisonment for life.

Almost four years subsequently, Appellant filed in the said District Court a "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellant expressly made this motion under and by virtue of the authority of Section 2255 of Title 28, U.S.C.A.

This Motion was filed in the District Court on September 29, 1956.

Appellant's said motion was denied by the District Court and from such denial the Appellant has prosecuted the instant appeal.

Jurisdiction below was conferred by 48 U.S.C.A. 101. Jurisdiction in this Court is conferred by 28 U.S.C.A. 1291, 2253 and 2255.

STATEMENT OF FACTS.

The facts necessary to be understood in order to comprehend and to determine the points raised by the Appellant on this appeal are easily stated.

The Appellee's first pleading was the indictment charging the Appellant with the crime of first degree murder in the killing by shooting of the Appellant's wife and another woman by the name of Eva Reed. The said indictment was brought under Section 65-4-1, ACLA, 1949. Proceedings were conducted under Criminal No. 2680 in the District Court for the District of Alaska, Third Judicial Division, at Anchorage. The indictment charged that the two murders were committed on March 11, 1952, at Anchorage, Alaska.

The charge was embodied in one count only. The indictment was filed October 22, 1952.

On November 28, 1952, Appellant, apparently without any legal counsel, was arraigned (see page 11 of

the Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence").

The minute order reflecting the arraignment (page 11 of the Appellant's said motion) closes with the following words, "whereupon, said defendant asking time within which to enter his plea or otherwise move against said indictment, the time therefore is continued".

On December 1, 1952, the Appellant again appeared before the Court, this time for the plea and sentence. On this occasion, as the minute order (page 10 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence") reflects, he was represented by counsel, Stanley J. McCutcheon, of Anchorage, Alaska.

According to the last-named minute order Appellant on said occasion pleaded guilty and waived his right to have further time before pronouncement of the sentence. Sentence was apparently thereupon pronounced, and the formal written memorial of judgment, sentence and commitment was signed in open court on the 3d day of December, 1952 (see page 9 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). The sentence imposed was life imprisonment (see page 8 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence").

After serving nearly four years of his sentence and while an inmate of the United States Penitentiary, McNeil Island, Steilacoom, Washington, the Appel-

lant undertook a legal attack on the judgment and sentence. This took the form of a 2255 proceeding and was filed in the District Court on September 29, 1956, in the form of the motion to vacate and set aside the sentence, already alluded to several times above.

Appellant's said motion was denied by the District Court on November 23, 1956, and the formal order of denial was signed by the District Court on January 31, 1957. The formal order of denial is titled "Order Denying Defendant's Motion to Vacate and Set Aside the Sentence" and the same is a part of the record which has been certified to your Honorable Court. It is from the denial of Appellant's said "Motion to Vacate and Set Aside Illegal Judgment and Sentence" that Appellant prosecutes the instant appeal. On page 1 of Appellant's "Designation of Records and Points Relied Upon on Appeal," copy of which was received in the office of Appellee's counsel on February 25, 1957, the Appellant has named four points on which his appeal is relying. In the argument portion of Appellant's "Opening Brief" he sets forth four grounds as the foundation of his appeal. See page 3 et seq. of Appellant's "Opening Brief". These two sets of four grounds each are substantially identical. Stated simply, they are:

1. Legal error committed by the District Court in accepting a plea of guilty to a first degree murder charge and imposition of a life sentence thereupon without the intervention of a jury.

2. Illegality of the arraignment due to the fact that Appellant was not represented there at by legal counsel.

3. Coercion by District Court officials as a result of which Appellant was caused to unwillingly enter a plea of guilty.

4. Violation of Appellant's constitutional rights by virtue of the three grounds named above.

Since these are the four grounds of the appeal, Appellee's Brief will be confined to these four items. Ground No. 4, the constitutional aspect of the claimed errors, will not be specifically treated by appellee in the brief because it is believed that Ground No. 4 is but an aspect of the other three grounds. Appellee's Brief, therefore, will be concerned only with the first three of such grounds.

It is necessary to make reference to two further factual matters, namely, the question of whether Appellant was or was not in fact represented by counsel at arraignment; and the question of whether coercion was or was not employed against Appellant to induce him to make a plea of guilty. These two factual matters will be taken up in the order named.

It is obscure whether Appellant was or was not represented by counsel at his arraignment. The available data on this subject are as follows:

Appellant claims he did not have counsel present at the arraignment (see page 2 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). There is not present in the record before your Honorable Court any transcript of the proceedings of November 28, 1952, when Appellant was arraigned. The District Court's minute order memorial-

izing the proceedings (see page 11 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence") mentions Mr. Seaborn Buckalew's appearing for the Government as the United States Attorney and mentions the presence of the Defendant but does not mention the presence of any counsel for the Defendant. When the District Court, on November 23, 1956, heard and denied Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence" no testimony was offered to the Court, on the subject of the presence of counsel at the arraignment, and, hence, this resource of information offers no help on the question of whether counsel was or was not present at the arraignment. Appellee's position is that in such obscurity of fact, no conclusion of fact may be made; but that even if your Honorable Court should assume for argument's sake that counsel was absent at the arraignment, the same would constitute no legal error, nor warrant any relief in this appeal, and this proposition will be more fully ventilated in the ARGUMENT section of this brief.

The second and last factual matter is the question of whether coercion was or was not applied to the Appellant in connection with his guilty plea. Appellant made such a claim in his pleading (see Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence" at page 3, Paragraph II; and see page 7 of Appellant's "Opening Brief"). The question of coercion was not made the subject of the presentation of any evidence or testimony in the District Court on November 23, 1956, when Mr. Stanley

J. McCutcheon, the attorney for the Appellant, unsuccessfully argued for the granting of the Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellee's position, however, on this factual issue, is that the record before your Honorable Court conclusively shows that there was, and could have been, no coercion against the Defendant resulting in his pleading guilty. This will be made the subject of one of Appellee's propositions in the ARGUMENT section of this Brief.

ARGUMENT.

PROPOSITION I.

JUDGMENT OF THE COURT BELOW SHOULD BE AFFIRMED AND THE APPELLANT ACCORDED NO RELIEF WHATSOEVER IN THIS APPEAL BECAUSE IN SELECTING 2255 AS HIS INSTRUMENT OF ATTACK ON THE JUDGMENT BELOW, HE HAS SELECTED AN IMPROPER AND INCOMPETENT INSTRUMENT.

It is but to state the universally accepted to point out that a 2255 proceeding is a limited one, specialized in nature, and limited in orbit. It is not a "catch-all" thing for the purpose of launching any and all sorts of attack on judgments of trial courts. I will not labor the point further, but will content myself with citing one passage from a well-known authority:

> "The form of attack is direct, but the grounds for the motion are limited to matters that may be raised on collateral attack, and the motion may not be used in lieu of appeal to review questions which were raised or should have been

raised upon the trial." Footnote 63.1, page 93, 1956 Pocketpart of Barron and Holtzoff, Federal Practice and Procedure, Volume IV, Section 2306. See also Proposition I in the Argument section of the appellee's (United States of America) brief in Case No. 15,190 in the United States Court of Appeals for the Ninth Circuit, *Tillman Foster Etherton, appellant, v. United States of America, appellee,* a pending case in your Honorable Court.

What alternatives were open to Appellant to be utilized by him in the selection of attacks upon the validity of the proceeding which he now contests? In tabular form immediately following this sentence, I have listed the five different vehicles of attack, other than the present proceeding, which the Appellant might have chosen, and under our system of jurisprudence, should have chosen, as his weapons of attack, one or more of which vehicles would have been suitable for the errors he claims were committed:

	Type of Proceeding	Time	Authority
1.	Motion for new trial	5 days	Fed. Cr. Rule 33
2.	Appeal	60 days	28 U.S.C.A., Sec. 2255 and Sec. 2107
3.	Motion to correct sentence	60 days	Fed. Cr. Rule 35
4.	Grant of parole by trial judge (questionable constitutionality).	5 years	Chapter 195, Session Laws of Alaska, 1955
5.	Withdrawal of plea of guilty and repleading	At any time	Fed. Cr. Rule 32 (d)

I will not elaborate further on the table of five alternative proceedings, which I believe to be rela-

tively self-evident, for the reason, frankly, that your Appellee does not wish to educate the Appellant into some further and additional proceeding which in all probability would ultimately fail, after dint of much labor expended by both the Government and himself, because of an intrinsic lack of merit in the proceeding.

PROPOSITION II.

NO ERROR PREJUDICIAL TO APPELLANT WAS COMMITTED BY THE TRIAL COURT WHEN IT ACCEPTED A PLEA OF GUILTY TO A FIRST DECREE MURDER INDICTMENT AND THEREAFTER IMPOSED IMPRISONMENT FOR LIFE.

The two sections of the ACLA 1949 which are applicable to this matter are section 65-4-1, and the second sentence of section 65-4-2. These sections are as follows:

> "*65-4-1. First degree murder.* That whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate, any rape, arson, robbery, or burglary, kills another, is guilty of murder in the first degree, and shall suffer death."
>
> "*65-4-2. Obstructing or injuring railroad. Verdict.* * * * That in all cases where the accused is found guilty of the crime of murder under this and the next preceding section, the jury may qualify their verdict by adding thereto 'without capital punishment;' and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life."

It should be noted that the imposition of the penalty of death is mandatory under section 65-4-1 in the event a defendant is convicted of first degree murder, and, of course, a defendant who pleads guilty is thus convicted.

It is apparent, therefore, that if the learned trial judge had followed the explicit mandate of the territorial statute, the Appellant would have been put to death. The learned judge's failure to obey the legislative will in this connection constituted, of course, legal error. But it is error against the Appellee and in favor of the Appellant. It seems to be obvious that the action of the trial court did not harm the Appellant but rather provided him with a substantial benefit which was improper, namely, the commutation of the death penalty to one of life imprisonment.

Now, that portion of section 65-4-2, above quoted, permits a jury to scale the penalty downward from death to life imprisonment. This, surely, does not mean that jury must be impaneled to determine guilt in a case where a defendant pleads guilty. Such action would be superfluous, a ridiculous thing. No statute should be interpreted so as to achieve such a result. In Appellee's humble opinion, the meaning of this portion of the statute is that when a case of first degree murder is contested and the defendant is found guilty by a jury after such contest, the jury has the power statutorily given to commute the extreme penalty.

Since there was no contest on the issue of guilt and, hence, no intervention by a jury to determine

that issue, that portion of the statute referring to the commutation of the death penalty by the jury is not applicable to this case; and it, therefore, follows that if there be error on the part of the learned trial judge, it was error in favor of the Appellant consisting in the trial judge's failure to impose the death sentence made mandatory by the statute.

Another plain and short answer to Appellant's contention of impropriety in a plea of guilty to a first degree murder charge followed by sentencing without intervention of jury is that it is a principle of jurisprudence that same is permissible. The first sentence of the second paragraph of section 269 of 14 Am. Jur., Criminal Law, is as follows:

> "There is no doubt that in the absence of statute, a defendant has a right to plead guilty and, if not prohibited by statute, may be executed upon such plea to a charge of a capital offense," citing 6 ALR 694.

No Alaskan statute prohibiting such an action has been uncovered in our research nor are we advised of the existence of any such statute.

The federal rule appears to be consonant with the position taken by Appellee and elaborated in the discussion above. See *Donnelly v. United States,* CA 10th, 1950, 185 F.2d 559, Certiorari denied 71 Sup. Court. 528, 340 U.S. 949, 95 L. Ed. 684, to the effect that a district court has jurisdiction to accept a plea of guilty of the capital offense of murder freely and voluntarily entered with the advice of counsel. That the plea was made freely and voluntarily by the

appellant would appear to be shown clearly by the transcript of proceedings in connection with plea and sentence (page 13 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). Also the freedom and voluntariness of the plea is substantiated by implication in the correspondence between Attorney McCutcheon and the Appellant (see pages 15 and 16 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence"). Further treatment of the freedom and voluntariness with which the plea was entered will be given by Appellee in the discussion under Proposition VI, post, dealing with the absence of coercion in connection with the plea of guilty.

The same case referred to above (*Donnelly v. United States*) also seems to stand for the proposition that a voluntary plea of guilty constitutes a waiver of jury trial and a consent to the imposition of any legal sentence. This should be sufficient to lay at rest the Appellant's contention that the plea of guilty was vitiated by the non-intervention of a jury.

PROPOSITION III.

THE QUESTION OF THE PRESENCE OR ABSENCE OF APPELLANT'S COUNSEL AT APPELLANT'S ARRAIGNMENT IS INVOLVED IN SUCH OBSCURITY AS THAT NO JUDICIAL ACTION CAN BE TAKEN THEREON; BUT A REMAND TO DETERMINE THE FACTUAL ISSUE IS NOT NECESSARY IN VIEW OF PROPOSITION IV OF THIS BRIEF WHICH ESTABLISHES THAT NO LEGAL INVALIDITY RESULTS FROM THE ABSENCE OF COUNSEL AT THE ARRAIGNMENT.

The obscurity surrounding the question of the presence or absence of Appellant's counsel at the arraignment has been already covered in the Appellee's Statement of Facts in this brief, ante. The Appellee's position is that the District Court was not in error in failing to require the taking of testimony or the reception of evidence on this factual matter because of the fact that even were counsel in fact shown to be absent from the arraignment no legal invalidity would follow. The absence of legal invalidity consequent upon an absence of counsel from a defendant's arraignment is dealt with in the next proposition of this Argument.

PROPOSITION IV.

ASSUMING THE ABSENCE OF APPELLANT'S COUNSEL AT THE LATTER'S ARRAIGNMENT, NO PREJUDICIAL ERROR STEMMED THEREFROM.

The Territorial statute requiring the presence of counsel at an arraignment is as follows:

> "*Section 66-10-3. Informing Defendant of right to counsel.* That if the defendant appears for arraignment without counsel, he must be informed by the court that it is his right to have

counsel before being arraigned, and must be asked if he desires the aid of counsel."

But failure to comply with this statutory direction must be regarded in the light of Section 66-1-5, ACLA, 1949, which is the classical "harmless error" statute. The text of that section is as follows:

"*Section 66-1-5. Effect of departure from statute.* That neither a departure from the form or mode prescribed by this act, in respect to any pleadings or proceedings, nor any error or mistake therein, renders it invalid, unless it has actually prejudiced the defendant, or tend to his prejudice in respect to a substantial right."

Consonant with and to the same general effect is Federal Criminal Rule 52 (a).

Now, in the Appellant's case he was arraigned and then the said Appellant asked a continuance of the matter in order that he might consider the plea that he would enter or consider the possibility of moving against the indictment. This continuance was granted him. See page 11 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence". Appellant was subsequently provided with the services of a competent attorney, Stanley J. McCutcheon, Esq., of Anchorage, Alaska. It was three days after the arraignment that Mr. McCutcheon and the Appellant appeared in the District Court for the offering of the plea and the fixing of the time for pronouncing sentence. See page 10 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence."

The colloquy between all parties of the court and the Appellant and the transcript of the proceedings in connection with the plea and sentence is given verbatim on pages 13 and 14 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence".

Referring to Section 66-1-5 ACLA 1949, set forth verbatim just above, it is the Appellee's position that error, if any, involved in the absence of counsel from the arraignment would scarcely "tend" to prejudice the Appellant in a situation where a plea of guilty was taken and where the Appellant was actually furnished a competent counsel before any plea was asked for or received.

PROPOSITION V.

IF ANY ERROR THERE WERE DUE TO THE ABSENCE OF APPELLANT'S COUNSEL AT APPELLANT'S ARRAIGNMENT, THE ERROR WAS WAIVED.

The Appellee's position on this point is that if the Appellant had wished to be rearraigned in order to have counsel at the arraignment it was open to him to make such a claim when, in this case, he appeared three days after the arraignment for the offering of plea. The three-day period was ample time for him to make up his mind as to whether he wished to assert a demand to be rearraigned (with counsel). Yet the record in this case shows that three days passed from November 28, 1952, until December 1, 1952, and the Appellant was silent on December 1, 1952, when he

offered his plea of guilty and was sentenced for his crimes. Having had adequate time and further, adequate opportunity, to object to the irregularity in the arraignment, he must be held to have waived same.

The waiver of irregularities in the arraignment is a matter of general principle. I cite a portion of the text from the top paragraph on page 92 of Section 1961 of Volume IV of Barran, Federal Practice and Procedure, as follows:

> "Objections to irregularities of arraignments may be waived and are waived if not timely made. Thus, a defendant who stands silent while his counsel announces his plea of guilty, has no recourse after entering upon the service of the sentence imposed upon that plea. * * *"

PROPOSITION VI.

THE FILES OF THE COURT AND THE RECORD CONCLUSIVELY SHOW THAT THE APPELLANT WAS NOT THE VICTIM OF ANY COERCION AND THIS GROUND OF HIS APPEAL THEREFORE FAILS.

The Appellee's position on this matter is that the exhibits attached to Appellant's own "Motion to Vacate and Set Aside Illegal Judgment and Sentence" reflect that the Appellant was not the victim of any coercion but was, rather, simply mistaken in the duration of the period required to be served prior to eligibility for parole. Disappointed expectation, of course, constitutes no basis for vacating a sentence. Thus in Volume IV, Barron, Federal Practice and Procedure, 1956 Pocketpart, Section 2306, page 96, at the text for Footnote 79.1, this author states:

"That a defendant, on his plea of guilty, received a longer or more severe sentence than he anticipated is no basis for vacating a sentence," citing four cases from various federal circuit court of appeals.

A perusal of pages 10 through 20 of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence" will disclose that the Appellant and his counsel mistakenly believed that on a sentence to life imprisonment, a prisoner was eligible for consideration for parole at the end of ten years. This, of course, was not the law. The applicable statute providing for eligibility for parole is Title 18, U.S.C.A., Section 4202, which states that a prisoner sentenced to life imprisonment is not eligible for parole until after service of fifteen years of such imprisonment. He and his attorney were both apparently mistaken or ignorant with respect to this statute. It may be that even the then United States Attorney or his then assistants who were connected with the case were mistaken or in ignorance as to this statute. This cannot be known from the state of the record before this Honorable Court nor is it in the least important. At any rate, it is clear from the exhibits attached to the Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence" that the Appellant was under the impression that he would be eligible for parole in ten years.

It is thus clear that the true gravamen of Appellant's grumble is his disappointment over learning that by statute he is not eligible for parole in ten years, as he thought, but only after he has served

fifteen years of his imprisonment. It is clear to be seen that this is the basis of his attack on the proceedings in the District Court and that it is disappointed expectation about the time of eligibility for parole that is involved here and not any coercion.

Incidentally, the Appellee would draw the attention of your Honorable Court to the point that it has been held that 2255 is not the proper vehicle for the allegation of coercion where the defendant is represented by counsel and such counsel is not charged with trickery. *Crowe v. United States,* CA 4th, 1949, 175 F.2d 799, certiorari denied, 70 Sup. Court 478, 338 U.S. 950, 94 L. Ed. 586, rehearing denied 70 Sup. Court 559, 339 U.S. 916, 34 L. Ed. 1341.

CONCLUSION.

In view of the propositions of law and of fact set forth by the Appellee, supra, it follows that the Appellant must take nothing by this appeal and the denial by the District Court of Appellant's "Motion to Vacate and Set Aside Illegal Judgment and Sentence," from which denial this appeal has been pursued, should be affirmed.

Dated, Anchorage, Alaska,
March 21, 1957.

Respectfully submitted,

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